EVOLVING THE RULE OF REASON FOR LEGACY BUSINESS CONDUCT

BY JOHN M. YUN[1]

1 Associate Professor of Law, Antonin Scalia Law School, George Mason University. I thank Scalia Law student Thyme Hawkins for excellent research assistance.

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In administering the antitrust laws, is it relevant what a firm's market power was when a business practice was first implemented? Relatedly, should the commonness of a practice — in terms of use by other firms in a market or industry — be a consideration when assessing its legality? This article proposes that, under certain, well-specified conditions, the legacy of a business practice and its commonness within a market can be used as a "marginally procompetitive presumption" under the rule of reason framework. Specifically, if a practice was implemented before a firm obtained substantial market power or a practice is commonly used by other firms across the market power spectrum, then the burden placed on defendants to demonstrate the practice is procompetitive should be lessened in proportion to the strength of the legacy and commonality.

I. INTRODUCTION

Consider the different outcomes in the following cases. The defendant prevailed in the landmark Supreme Court decision *Ohio v. American Express Co.*, and the dispute centered around the use of an "antisteering" policy that had been in place since the 1950s.[2] Similarly, in *FTC v. Qualcomm Inc.*, the government lost its challenge to Qualcomm's decades-long licensing practices for its standard essential patents.[3] In contrast, the government prevailed in part in *United States v. Microsoft Corp.* when it targeted Microsoft's newly-implemented and reactionary practices to the growth of Netscape.[4] What to make of these facts? Does the legacy of a business practice even matter? Is the firm's market power at the time it first implemented the business practice relevant? Relatedly, should the commonness of a practice — in terms of use by other firms in a market or industry — be a consideration when assessing its legality?

This article examines how to incorporate legacy business practices into antitrust's rule of reason framework. Legacy business practices remain central in antitrust cases today. In *Epic Games, Inc. v. Apple, Inc.*, the parties dispute the legality of Apple's policies that date back to the introduction of the App Store on July 10, 2008[5] — over fifteen years ago when Apple's share of the smartphone market was significantly less than today.[6] Does the fact that Apple's App Store has been the exclusive distribution point for software since its entry give us information about the legality of the practice under the antitrust laws? This Article argues, yes: a practice's legacy and commonness can and should inform decisionmakers. Specifically, a practice that has been in place since the product's entry or before the product obtained substantial market power should enjoy a marginally procompetitive presumption.

II. THE CASE FOR ANTITRUST LAW PRESUMPTIONS

For context, adjudicating antitrust decisions is a complicated enterprise, whether applying the rule of reason or a *per se* framework. Indeed, pointing to this complicated nature helps justify attempts to radically reform antitrust, including the replacement of effects-based merger analysis with structural presumptions[7] and an overall hostility towards efficiency claims and procompetitive arguments.[8] Granted, anyone who has worked on an antitrust case can understand why a reformer would use the complexity of cases as a justification for radical proposals. Antitrust can be a difficult business. Even something as straightforward as price fixing, which is a *per se* illegal violation of the Sherman Act, requires evidence that the parties, well, fixed prices. Relatedly, much of the handwringing over artificial intelligence and algorithmic collusion is over the concern that enforcers will be unable to detect and enforce this potential frontier of price fixing.[9] Thus, the broader concern is that agencies, parties, and courts face an information problem: what we know via documents, data, hearings, interviews, scholarship, etc. will always have limits. The question then becomes how to assess the legality of various business practices, such as mergers, exclusive dealing, or tying, considering this information problem while preventing too great an administrative burden.

One answer — and a big part of reformers' proposed solutions — to make antitrust operational and manageable is the use of presumptions that can significantly reduce the administrative burden of cases. For instance, because price fixing is a per se antitrust violation, we presume that price fixing is harmful to consumers and the competitive process, and courts can skip assessing the competitive effects of price fixing for each case. Yet, even under the rule of reason framework, presumptions can be critical to operationalize the antitrust statutes. For example,

2 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018) ("Amex has prohibited steering since the 1950s by placing antisteering provisions in its contracts with merchants.").

3 *FTC v. Qualcomm, Inc.*, 969 F.3d 974, 1005 (9th Cir. 2020); *FTC v. Qualcomm, Inc.*, 411 F. Supp. 3d 658, 783 (N.D. Cal. 2019) ("A summary exhibit collecting Qualcomm's patent license agreements over the past 30 years shows that Qualcomm has consistently charged OEMs a 5% running royalty for licenses to Qualcomm's patent portfolio. . . . Qualcomm charged Siemens a 5% running royalty in 1996 and charged VIVO a 5% running royalty in 2015.").

4 *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

5 Dieter Bohn, *The Apple App Store: A Brief History of Major Policy Changes*, The Verge, Sep. 10, 2021, https://www.theverge.com/22667242/apple-app-store-major-policy-changes-history.

6 See e.g. iClarified, *The History of the Smartphone Market From 2005-2012* [Chart], iClarified (Mar. 21, 2013), https://www.iclarified.com/28457/the-history-of-the-smartphone-market-from-20052012-chart/ (indicating Apple's smartphone market share was approximately 15 percent in 2008).

7 See Press Release, Fed. Trade Comm'n, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines/.

8 U.S. Dep't of Just. & Fed. Trade Comm'n, Request For Information on Merger Enforcement (2022), https://www.regulations.gov/document/FTC-2022-0003-0001/ at Section 14.

9 See generally Ai Deng, *What Do We Know About Algorithmic Collusion Now? New Insights from the Latest Academic Research* (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521959.

practices that do not reach the level of price fixing, but involve some degree of coordination between rivals, fall under the rule of reason, but they move the "sliding scale" significantly closer to the *per se* illegal line.[10] This presumption makes sense given the inherent dangers involved with rivals regularly communicating with each other. In contrast, other presumptions are poorly founded and disincentivize procompetitive behavior, such as the prior prohibition of vertical restraints as a *per se* illegal act.[11] As a result, effective and appropriate antitrust presumptions must utilize market information to accurately predict a practice's competitive effects.

This Article proposes that, under certain conditions, legacy and commonness can trigger a marginally procompetitive presumption under antitrust's rule of reason framework.[12] Specifically, if a firm implemented a practice before the firm obtained substantial market power and other firms across the market power spectrum commonly use the practice, then the defendant's burden to demonstrate the practice is procompetitive should be lessened in proportion to the strength of the legacy and commonness. This presumption reflects the idea that if a firm adopted a practice before its product had market power, then this legacy materially reduces the likelihood, all else equal, that the firm uses the practice for anticompetitive ends. This logic is consistent with the following explanation from the Supreme Court in *Grinnell*: we must distinguish between "willful acquisition or maintenance" of market power from "growth or development as a consequence of a superior product, business acumen, or historic accident."[13] Below, this Article details a hypothetical scenario to illustrate a legacy practice and present the exact conditions when the procompetitive presumption should apply.

III. SCENARIO

To illustrate a legacy practice, suppose a web browser branded as "Velocity Vista" enters the browser market. The browser is wholly integrated with a proprietary search engine branded "Velocity Search," which innovatively employs a proprietary algorithm that accurately identifies search intent with 10 times less data than a conventional search engine. Additionally, the latency of the browser and search engine — latency being the delay before a page loads — is the lowest in the industry, and thus the loading speed is the best, due to a code protected by a trade secret. After eight years of steady growth, eventually, the browser share reaches 40 percent. Further, the search engine has now captured 33 percent of the general search engine market due to the innovative algorithm, world-class loading speeds, integration of specialized news, and state-of-the-art AI — all features included when the product entered the market.

Ultimately, with this market success, competitors begin to raise concerns and advance the theory that Velocity Search captured a third of the market by leveraging its market power from its now-popular browser to the search engine market. Further, since Velocity Vista prevents changing the default search engine, the company uses an exclusive tie to foreclose rivals and deny them scale and data. Specifically, the allegation is that, *but for* the exclusive position of the search engine, the search engine market would be significantly more competitive, and Velocity Search would have appreciably less share. Suppose that the market shares of Velocity Vista reach 60 percent with evidence that some users would prefer the option to have a default system rather than an exclusive system.

Given this information, how should the antitrust agencies consider the prior scenario — the vertical integration of the browser and search engine? Of course, additional details about the conduct and market will matter, but a highly relevant fact is the search engine entered the market integrated with the browser. This fact breaks the simple causal claim that the exclusive tie is a manifestation of market power and that the success of the product is due to a leveraging of that market power. Often, antitrust cases imply that, because a firm has substantial market power, the firm engages in practices because of that market power. Instead, examining the legacy of a practice places the burden on the plaintiff to demonstrate why a previously procompetitive — or, at least, a competitively neutral — practice is now anticompetitive. Of course, a plaintiff already has the burden to demonstrate anticompetitive harm in the rule of reason framework, but the question remains: how great is the plaintiff's burden? For legacy practices, a reasonable approach could use a marginally procompetitive presumption that raises the burden on the plaintiff or lowers the burden on the defendant to make a procompetitive justification.

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10 See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 778–80 (1999). See also Phillip Areeda, An Analysis of Antitrust Principles and their Application 302 (1978) ("The law might vary the necessary proofs . . . according to the sanctions at issue and according to the relationship of the defendant's power to his conduct.").

11 See e.g. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57–59 (1977) (establishing that franchise agreements should be considered under a reasonableness standard as opposed to the prior lens of a per se condemnation established in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)).

12 See Steven C. Salop, *An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards*, (SSRN, Working Paper Nov. 6, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068157/ at 45 (explaining that within the rule of reason framework, a "marginally procompetitive presumption would place only a marginal thumb on the scale"). The ideas expressed in this Article are based largely on an earlier piece. See John M. Yun, *The Legality of Legacy Business Practices in Antitrust*, 24 U. Pa. J. Bus. L. 244 (2021).

13 *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

IV. PROPOSAL FOR LEGACY BUSINESS PRACTICES

Thus, the proposal is that legacy and commonness are relevant features of a product that can inform decisionmakers on the market impact of a business practice or conduct. Certainly, courts have previously recognized that the history of a practice may be material.[14] Yet, antitrust law does not currently have a formal approach to consider this history. Specifically, this Article proposes a three-factor test to provide agencies and courts with practical indicia to assess legacy evidence.

The first factor is a baseline determination of whether the firm instituted the practice at entry or before gaining substantial market power and, if so, how long before. Generally, this should be a straightforward inquiry. In essence, this factor looks to the market conditions when the purposed legacy practice "began." A corollary, however, is the relevant market conditions are "reset" by subsequent modifications to the practice that make it more restrictive.

Next, the second factor examines the practice's commonness. Effectively, do competitors, across the market power spectrum, employ the same or similar practices? If only firms with market power use the practice, then when did they adopt the practice? Commonness indicates a practice has gained widespread adoption that, absent concerns of collusion, suggests the practice achieves some efficiency gain, such as lowering cost or improving quality. A key caveat is commonness should focus on the practice *within* the relevant market, i.e. intra-market commonness — rather *across* markets, i.e. inter-market commonness. In order to reduce error costs, the frequency of the practice across different markets should not necessarily factor into this proposed legacy practices presumption, but inter-market commonness remains relevant to the broader antitrust inquiry — our presumptions of price fixing and other practices, such as resale price maintenance, are built on this idea of examining the widespread use of a practice. Another caveat is commonness cannot be due to coordination among the competitors.

Finally, the third factor asks whether anything changed since the practice went into effect. To clarify, this factor checks for regulatory, legal, or technological changes in a market that negate the practice's prior procompetitive justification or significantly mitigate the practice's procompetitive effects. For example, if other firms have widely replaced the use of exclusive agreements to incentivize promotion of a product with innovative contracting incentives that utilize real-time sales data, then this change raises serious questions about the value of the exclusive agreement practice's legacy.

Given these factors, when should a procompetitive presumption apply? Both the first and second factors are sufficient conditions to merit a beneficial presumption; although, the presumption is the most justified when it has both a legacy and commonness. The third factor is more of a reality check; it prevents this presumption from protecting an obsolete and anticompetitive practice based on legacy by considering modern conditions. Broadly, the strength of the presumption should calibrate to the degree of the legacy and commonness evidence.

To the benefit of antitrust enforcement, legacy considerations would likely prevent simple causal claims of widespread anticompetitive harm due to practices that are long-standing and likely part of the success of a product. Another advantage is that this proposal gives greater predictability and consistency to businesses for their long-established practices — even in the face of antitrust agency leadership changes, different administrations' priorities, and so forth. Even when this presumption applies, plaintiffs will still have ample opportunity to demonstrate the practice is anticompetitive and harms the competitive process in a manner proscribed by the antitrust laws.

A possible concern about this proposal, however, is whether affording a procompetitive presumption to legacy practices could create a moral hazard for businesses. Specifically, does this proposal incentivize firms to preserve legacy practices as "insurance" against antitrust allegations or induce them to adopt common industry practices, even if a newer, unique approach would be more beneficial to the firm and its consumers? While a legitimate concern, the disincentive to implement unique and evolutionary business practices is likely to be minimal if the newer practice is truly welfare enhancing. While the marginal presumption would be lost, the practice will still be considered under a rule of reason. Thus, the firm would have sufficient opportunity to demonstrate its efficiency.

14 See e.g. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 2408 (2015) ("Used in antitrust law, the rule of reason requires courts to evaluate a practice's effect on competition by 'taking into account a variety of factors, including specific information about the relevant business, its condition before and after the [practice] was imposed, and the [practice's] history, nature, and effect.'" (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997))).

V. CONCLUSION

Ultimately, the value of legacy and commonness corresponds to the extent they give reasonable forecasts to antitrust decisionmakers on the competitive merits of a business practice. This proposal aims to reduce judicial burdens through sensible and well-founded presumptions, without substantially sacrificing accuracy — whether in finding harm or showing benefits. Inevitably, the rule of reason framework should evolve as our understanding of various business practices evolves. Typically, our economic understanding of a practice grows with research based on market evidence, such as with resale price maintenance or exclusive dealing, that, in turn, can inform us as the practice's justifications. Legacy and commonness also provide information about a practice, but the insights are market-specific. In this way, developing presumptions based on legacy and commonness can allow us to further develop the rule of reason as a practical tool without overly burdening the judiciary.

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